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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner,*

v.

ALFRED ARTHUR SANDOVAL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. In *Lindh v. Murphy*, this Court held that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") did not apply to cases pending on the date of enactment, April 24, 1996. 521 U.S. 320, 326-27 (1997). Did Sandoval, who filed his first federal habeas corpus petition on July 1, 1996, commence a "pending case" -- thereby defeating AEDPA's application -- simply by requesting appointment of counsel and a stay of execution prior to the enactment of the statute?

2. Was the authority of this Court sufficiently clear, under AEDPA's standard of review, to permit federal habeas corpus relief on a claim that a trial prosecutor unconstitutionally referred to the Bible during the penalty phase argument of a capital case?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Arthur Calderon, Warden of the California State Prison at San Quentin ("the Warden"), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals appears at Appendix L to the petition and is reported at 241 F.3d 765 (9th Cir. 2001). The original opinion appears at Appendix K and is reported at 231 F.3d 1140 (9th Cir. 2000).

The unreported orders of the United States District Court granting in part, and denying in part, relief appear at Appendix

J to the petition. The California Supreme Court's opinion denying relief on this issue appears at Appendix D and was reported at 4 Cal. 4th 155 (1992).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued an amended opinion on February 21, 2001. This Petition for Writ of Certiorari follows within 90 days. The Warden invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

In the early morning hours of October 14, 1984, Sandoval shot and killed Anthony Aceves and Gilbert Martinez in East Los Angeles' Belvedere Park. During the incident, Sandoval

attempted to murder a third man, Manuel Torres, whom he shot, non-fatally, in the neck. Around 12:45 a.m., October 31, 1984, Sandoval shot and killed Ray Wells in the victim's living room. Sandoval apparently believed Wells had helped the police locate a car used to flee from the scene of the Belvedere Park shootings. Inside the Wells home, Sandoval also shot to death Ray Wells' wife, Marlene. He later explained the Wells murders to a fellow gang member: "Bennie, I just did the big mouth in." He added, "You know I take care of business. I had to do [Marlene], too," because she had witnessed the killing of her husband.

A Los Angeles County Superior Court jury convicted Sandoval as charged of four counts of murder and one count of attempted murder. The jury further found true the special circumstance allegations that Sandoval committed multiple murder. Appendix A. The jury returned a death verdict as to count IV, the murder of Marlene Wells; it, however, elected to spare Sandoval's life as to the other three murder counts. Appendix B. The trial court sentenced Sandoval to death on count IV, to imprisonment for life without the possibility of parole as to the three remaining murder counts, and to twelve years in prison for the attempted murder. The court stayed the prison sentences pending Sandoval's execution. Appendix C.

The California Supreme Court affirmed Sandoval's conviction and sentence in a published decision following an automatic appeal. Appendix D, *People v. Sandoval*, 4 Cal. 4th 155, 14 Cal. Rptr. 2d 342, 841 P.2d 862 (1992). The court found, inter alia, that the trial prosecutor committed misconduct by paraphrasing Romans 13:1-7 during his penalty phase argument. *Id.* at 86-87. The court, however, held the error harmless beyond a reasonable doubt. *Id.* at 88. In support of its ruling that the death verdict resulted from rational decision making, the court noted the jury's lengthy and contemplative penalty phase deliberations. The court also took note of the jury's selective verdict, which condemned Sandoval only for the murder of Marlene Wells. *Id.* The court subsequently denied

without comment a petition for writ of habeas corpus filed by Sandoval. Appendix N.

On September 28, 1993, this Court granted Sandoval's petition for certiorari to consider whether he "[was] deprived of due process and a fair jury trial by the use of California's reasonable doubt instruction." *Sandoval v. California*, 509 U.S. 954 (1993). On March 22, 1994, this Court affirmed Sandoval's conviction and upheld the reasonable doubt instruction in a published opinion reporting two consolidated cases. Appendix E, *Victor v. Nebraska*, 511 U.S. 1, 23 (1994).

On December 7, 1994, Sandoval filed a request for appointment of counsel and a stay of execution in the United States District Court for the Central District of California. Appendix F. The same day, the district court issued a Notice of Filing Death Penalty Habeas Corpus Petition and granted an Order Staying Execution. Appendix G.

On July 1, 1996, Sandoval filed a Petition for Writ of Habeas Corpus in the district court. Appendix H. On July 29, 1996, he filed an Amended Petition. Appendix I. The district court entered an order finding the Amended Petition partially unexhausted and holding federal proceedings in abeyance pending exhaustion. Sandoval filed a second petition for writ of habeas corpus in the California Supreme Court, but the district court sua sponte lifted its abeyance order before the termination of the state court litigation. The state court denied Sandoval's second habeas petition after the district court had granted a motion striking unexhausted claims from the federal petition. Appendices J, N.

The district court disposed of several claims in the Amended Petition on the Warden's first Motion for Judgment on the Pleadings. Appendix J. Later, the court granted the Warden's Motion for Summary Judgment as to several other claims. Appendix J. The district court held an evidentiary hearing to consider whether Sandoval's trial attorneys had provided ineffective assistance in presenting self-defense evidence. The court entered a final order rejecting the

ineffectiveness claim and disposing of several other issues -- including a challenge to the constitutionality of the prosecutor's penalty phase argument -- on the Warden's second Motion for Judgment on the Pleadings. Appendix. J. The court did, however, grant relief on a single claim, which concerned the misjoinder of counts. As a result, it vacated the conviction and concomitant death sentence for count IV. Appendix J.

The Warden appealed, and Sandoval cross-appealed to the United States Court of Appeals for the Ninth Circuit. In a published decision, the Court of Appeals reversed in part and affirmed in part the judgment of the district court after declining to apply AEDPA. Appendix K, *Sandoval v. Calderon*, 231 F.3d 1140 (9th Cir. 2000). The court reinstated the conviction for count IV but vacated the judgment of death, finding the prosecutor's argument prejudiced the penalty verdict. In all other respects the court upheld the denial of habeas relief over a dissent that called for a remand to the district court for evidentiary proceedings concerning Sandoval's waiver of his right to self-representation. Appendix K. On February 21, 2001, the Court of Appeals issued an amended opinion that modified aspects of its reasoning but not its judgment. Appendix L, *Sandoval v. Calderon*, 241 F.3d 765. The court granted the Warden's unopposed motion to stay the mandate pending the filing of this Petition for Writ of Certiorari. Appendix M.

REASONS FOR GRANTING THE WRIT

I.

BY APPLYING PRE-AEDPA LAW TO THIS CASE, THE NINTH CIRCUIT REINFORCED A CONTINENTAL DIVIDE THAT SPLITS THE NATION IN ITS APPLICATION OF HABEAS LAW TO DEATH ROW INMATES

On April 24, 1996, President Clinton signed into effect the Antiterrorism and Effective Death Penalty Act of 1996. On July 1, 1996, Sandoval filed his first federal petition for writ of habeas corpus in the United States District Court for the Central District of California, having sought and obtained appointed counsel prior to AEDPA's enactment. The year after Sandoval filed his petition, this Court ruled that AEDPA did not apply retroactively to cases pending on the effective date of the statute. *Lindh v. Murphy*, 521 U.S. at 326-27. Relying on *Lindh*, a three-judge panel of the Ninth Circuit Court of Appeals held that the filing of a petition for writ of habeas corpus, not a request for counsel, instituted a case for purposes of applying AEDPA. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283 (9th Cir. 1997) *cert. denied* 118 S. Ct. 1389. In 1998, the Ninth Circuit, sitting en banc, overruled *Beeler*, and held that a "case" began for purposes of applying AEDPA with requests for counsel and a stay of execution. *Calderon v. United States District Court (Kelly (V))*, 163 F.3d 530, 539-40 (9th Cir. 1998).

The Warden respectfully submits that the Ninth Circuit erred in its *Kelly (V)* decision, and therefore erred again, in applying the doctrine in this case. "Cases pending" – the term *Lindh* used to describe habeas matters excluded from AEDPA's reach – plainly refers to ongoing lawsuits. The Ninth Circuit's analysis did not contemplate this fact; instead it equated preliminary judicial decisions -- ones that do not even guarantee

the filing of a habeas petition -- with pending habeas cases. The court's reliance on preliminary motions for stay and appointment of counsel begs an important question – whether the denial of such applications would nonetheless create pending habeas cases.

That point aside, a straightforward interpretation of Supreme Court authority inexorably leads to the conclusion that AEDPA should apply to Sandoval's case. In *McFarland v. Scott*, this Court held that if a capital defendant invokes his federal statutory right to appointed counsel, he has a "post-conviction proceeding" pending. 512 U.S. 849, 856-59 (1994). As a consequence, a condemned state inmate need not file a habeas petition before a federal court stays his execution. *See id. McFarland*, however, recognized that neither § 2254 nor the rules governing federal habeas corpus explain how to commence a habeas proceeding. *See id.* at 854. While the opinion allows for the appointment of counsel prior to the filing of a formal petition, "*McFarland* does not hold that appointment of counsel also commences a post conviction proceeding within the meaning of § 2254." *Moore v. Gibson*, 195 F.3d 1152, 1162-63 (10th Cir. 1999), *citing Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997).

Recognizing the limited reach of *McFarland*, four circuits have determined that an application for the appointment of counsel does not commence a § 2254 action. *Moore v. Gibson*, 195 F.3d at 1162-63; *Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999); *Williams v. Coyle*, 167 F.3d 1036, 1039-40 (6th Cir. 1999); *Nobles v. Johnson*, 127 F.3d 409, 413-14 (5th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998). In contrast, only the Ninth Circuit has held that a request for the appointment of counsel begins a case for purposes of § 2254. *See Kelly (V)*, 163 F.3d at 539-40.

Not only does *Kelly (V)* stretch the meaning of *McFarland*, it also reflects an erroneous interpretation of its own principal authority, *Hohn v. United States*, 524 U.S. 236 (1998). *See* 163 F.3d at 539-40. *Hohn* held that an application for a certificate

of appealability constituted a "case," the denial of which this Court could review under 28 U.S.C. § 1254(1). *See* 524 U.S. at 241-42. *Hohn* in turn relied on an opinion that found appealable a district court's denial of a request for leave to file a habeas petition. 524 U.S. at 246, *citing Ex parte Quirin*, 317 U.S. 1, 24 (1942). These limited rulings do not compel the conclusion *Kelly (V)* attributes to them. Simply put, *Hohn* and *Quirin* define the jurisdiction of reviewing courts, not the existence of "cases" in the lower courts. *Moore v. Gibson*, 195 F.3d at 1163, *citing Williams v. Coyle*, 167 F.3d at 1040; *see also Kelly (V)*, 163 F.3d at 545 (Hall, J., dissenting) (distinguishing *Hohn*'s use of the word "case" to interpret Supreme Court jurisdiction from its use in AEDPA).

The error of *Kelly (V)* critically divided the country. Apart from the *Kelly (V)* court, no other federal appellate tribunal has concluded that a request for counsel by a death row inmate commences a case for purposes of AEDPA's application. Of course, only state inmates facing a death sentence enjoy a statutory right to counsel. 21 U.S.C. § 848. Accordingly, the *Kelly (V)* decision directly implicates only capital habeas matters and necessarily divided the nation's federal courts in their treatment of the most sensitive of litigation – collateral review of state death judgments.

Toward the end of fairness and the national uniformity of law, this Court should not permit justice to the condemned to differ fundamentally among the various judicial circuits. As Justice Van Devanter explained to Congress seventy-seven years ago, "The prime consideration in the exercise of discretionary jurisdiction [is] whether the case is of such a character that the last word, the ultimate guiding rule, should be announced by the Supreme Court, so that there may be uniformity of decision in the several circuits court of appeal . . . ." *See Wright v. North Carolina*, 415 U.S. 936 (1974) (Douglas, J., dissenting from the denial of cert.), *citing Hearings before Subcomm. of Sen. Comm. on Judiciary*, 68th Cong., 1st Sess., 29-30 (1924). What was true in the 1920s is

true at the dawn of the new Millennium – schisms on important questions of law demand the attention of this Court. *See Rotella v. Wood*, 528 U.S. 549, 553 (2000); *Gutierrez v. Ada*, 528 U.S. 250, 254 (2000).

What's more, the split in authority created by *Kelly (V)* threatens to affect capital habeas jurisprudence in perpetuity. Conflating the appointment of counsel with the existence of a pending case imperils the long-standing statutory bounds of federal habeas corpus. For over a century, this Court has recognized federal-state comity as the driving principle behind the exhaustion doctrine. *Ex parte Royall*, 117 U.S. 241, 251 (1886); *see also Rose v. Lundy*, 455 U.S. 509, 518 (1982) (noting "it would be unseemly" for federal courts to upset final state convictions absent a chance for the state's courts to correct the errors). A federal court cannot consider, much less grant, a state prisoner's habeas corpus petition unless the petitioner has first exhausted his state remedies as to every claim presented. 28 U.S. C. § 2254(b)(1); *Rose v. Lundy*, 455 U.S. at 522.

In *McFarland*, however, this Court extended the right to appointed federal habeas counsel to inmates who had not yet filed a petition. 512 U.S. 849, 856-59. In so doing, the Court relied on the non-specific "post conviction proceeding" language found in § 848(q)(4)(B), the statute authorizing appointments. *Id.* at 856. The Court also considered the desirability of affording attorneys to indigent inmates before they embarked, unassisted, in the highly technical and perilous world of capital habeas litigation. *Id.* at 856. Given the concerns that animate *McFarland*, as well as its open-ended holding, a district court arguably could appoint habeas counsel before a condemned inmate concluded his state court challenges to a judgment of death. *See generally In re Pruett*, 133 F.3d 275, 279 n.7 (4th Cir. 1997), *citing McFarland*, 512 U.S. at 855 ("Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.") Were this to occur in the Ninth Circuit, however, the rule in *Kelly (V)* would create a pending case

where counsel had no legal ability to file a cognizable petition. *See Rose v. Lundy*, 455 U.S. at 522.

Similar, presumably unintended, consequences of *Kelly (V)* portend a nationwide schism in capital habeas jurisprudence. *Kelly (V)*, after all, holds that a habeas case exists as soon as a condemned inmate makes his § 848 request for appointed counsel. 163 F.3d at 539-40. This Court, in turn, has not defined when a case is "pending" under AEDPA but has interchangeably used the expressions "cases pending," "cases filed," and "applications pending." *Lindh v. Murphy*, 521 U.S. at 322-23, 326, 329, 336; *see Nobles v. Johnson*, 127 F.3d at 413 & n.7. Thus, by force of *Kelly (V)*'s non-intuitive definition of a case, an "application" can be pending though the state inmate had filed none, only requested the provision of an attorney to prepare one.

Having reached this point, *Kelly (V)* becomes the cudgel with which death row inmates could attempt to beat the life from AEDPA. Seemingly, the Ninth Circuit's condemned population could never run afoul of AEPDA's one-year period of limitations, as they could claim the existence of pending cases based on their mere requests for appointment of counsel to draft petitions. *Cf.* 28 U.S.C. § 2244 (d). Surely, Congress did not intend this result when it enacted legislation entitled the Antiterrorism and Effective Death Penalty Act of 1996. Quite the opposite, the law was designed to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation." H.R. Rep. No. 104-23, at 29 (1996).

Capital punishment occupies a unique and controversial place in the annals of modern America. *See* R. George Knight, *The Death Penalty and the Way We Think Now*, 33 LOY. L.A. L. REV. 533, 533-34 (2000). The citizenry's confidence in that system requires an even-handed application of post-conviction remedies. The litigants in capital cases should play by the same essential rules no matter where they happen to live. This Court has traditionally granted certiorari to review important questions of law in capital cases. *See Grisham v. Hagan*, 361 U.S. 278,

278-79 (1960); *Mallory v. United States*, 354 U.S. 449, 450 (1957). This case contemplates a fundamental question in capital habeas litigation and will ensure that the federal courts apply the same standard of review nationwide. The Court, therefore, should grant certiorari to review the doctrine articulated in *Kelly (V)* and applied here to avoid application of AEDPA.

II.

SANDOVAL WOULD NOT HAVE SECURED HABEAS RELIEF UNDER AEDPA

Absent the Ninth Circuit's reliance on pre-AEDPA law, it would not have vacated Sandoval's death sentence. Under AEDPA, this Court is the exclusive source of jurisprudence against which to measure the propriety of state court judgments. 28 U.S.C. § 2254(d); *Williams v. Taylor*, 120 S. Ct. 1495, 1506-07 (2000). "If this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar." *Williams*, 120 S. Ct. at 1506-07. A state inmate can gain habeas relief only if he demonstrates that his state's courts "fail[ed] to apply the correct controlling authority" or applied the correct authority to a case involving materially identical facts but still "reach[ed] a different result." *Id.* at 1519-20.

In this case, the trial prosecutor paraphrased the thirteenth chapter of the Book of Romans, a portion of the New Testament, in his penalty phase argument to the jury. Appendices D, L. While offensive at many levels, the conduct did not run afoul of this Court's teachings. As a result, Sandoval could not have gained relief under AEDPA. *Williams*, 120 S. Ct. at 1506-07, 1519-20. The Ninth Circuit's opinion in this case, and the authority it cites, demonstrate the relative paucity of high court law on this issue. Quite simply, the *Sandoval* court could not marshal direct authority from this Court to support its finding that the prosecutor's misconduct amounted to constitutional error. Appendix L.

In support of its opinion, the Ninth Circuit cited one of its own cases and two Eleventh Circuit opinions regarding the general goal of argument – to direct the jury to a decision based on law and evidence rather than bias or prejudice. Appendix L

at 428-29, *citing Bains v. Cambra*, 204 F.3d 964, 974-75 (9th Cir. 2000); *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991); *United States v. Iglesias*, 915 F.2d 1524, 1529 (11th Cir. 1990). It cited but one distantly related case from this Court on the same general point -- an opinion that upheld the right of the Florida state courts to broadcast proceedings, but cautioning vigilance in the protection of fair trial rights. Appendix L at 428.

The *Sandoval* court then turned to the doctrinal core of its opinion, citing interpretations of the Eighth Amendment that limit the scope of statutes used to render defendants eligible for the death penalty. Appendix L at 429, *citing Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Of course, the constitutional bounds of sentencing schemes at the eligibility stage of capital proceedings in no way define what a prosecutor can argue to a jury charged with selecting the appropriate punishment. Under the Eighth Amendment, once the State has narrowed, by objective and reasonable criteria, the class of criminal homicides susceptible to capital punishment, the judge or jury that selects the appropriate penalty may exercise unfettered discretion, so long as the defendant's mitigating evidence receives a role in the determination. *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998); *Tuileapa v. California*, 512 U.S. 967 (1994).

Since Sandoval could not claim that the prosecutor's argument ran afoul of these requirements, the Ninth Circuit had no choice but to attempt to relate the Eighth Amendment more directly to argument. However, the only majority opinion cited in that regard originated in the Northern District of Georgia. Appendix L at 429-30, *citing Jones v. Kemp*, 706 F. Supp. 1534, 1559-60 (N.D. Ga. 1980). The Georgia case, and two dissenting Supreme Court opinions cited by the court on this point, discussed the impropriety of substituting the primitive simplicity of biblical vengeance for a sophisticated Eighth Amendment proportionality test. Appendix L 429-30, *citing Tison v. Arizona*, 481 U.S. 137, 180-81 (1987) (Brennan, J.,

dissenting) and *Coker v. Goergia*, 433 U.S. 584, 620 (1977) (Burger, C.J., dissenting).

Neither the dissents nor the district court opinion represent the clear authority of this Court. *See Williams. v. Taylor*, 120 S. Ct. at 1507. Furthermore, none of the three opinions bears any relation to the controverted prosecutorial comments at the bottom of this dispute. The prosecutor's argument did not involve the principle of an eye for an eye, but instead responded to a defense comment about "play[ing] God to an individual," and involved a discussion of the religious foundation for capital punishment as a whole. *See* Appendix L at 427-28 n.1. Given these facts, the California Supreme Court did not contradict or unreasonably apply any of the Eighth Amendment authority relied on by the Ninth Circuit. *Cf.* 28 U.S.C. § 2254(d).

For the same reason, the Ninth Circuit could not have granted relief under AEDPA had it relied, as it did here, on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Appendix L at 430. In *Caldwell*, this court vacated a death sentence because the prosecutor affirmatively assured the jury that it would not be the final arbiter of the defendant's mortality -- a job he said would automatically fall to the appellate courts. 472 U.S. 330-34. This Court has recognized that a valid *Caldwell* claim requires affirmative misdirection of the penalty jury, as a matter of state law. *Jones v. United States*, 119 S. Ct. 2090, 2099 (1999); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *Dugger v. Adams*, 489 U.S. 410 (1989). In this case, the trial prosecutor took the opposite tack, neither describing the State's capital sentencing procedures nor attempting to diminish the jury's responsibility. Instead he laid all responsibility for Sandoval's life squarely at the jurors' feet, simply assuring them that God ordained their authority. Appendix L at 427-28 n.1. Again, the authority cited by the Ninth Circuit did not compel relief under AEDPA.

Turning to generalized notions of fair trial and proper prosecutorial argument, the court in *Sandoval* found itself mining another bare vein of high court authority. The opinion

discusses no authority from this Court and relies on three circuit court opinions, three state court opinions, and a case from the Court of Appeal in Ontario, Canada. See Appendix L at 430-31, *citing Coe v. Bell*, 161 F.3d 320, 351 (6th Cir.1998); *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir.1996); *Cunningham v. Zant*, 928 F.2d at 1019-20; *United States v. Giry*, 818 F.2d 120, 133 (1st Cir.1987); *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1990); *People v. Eckles*, 83 Ill. App.3d 292, 38 Ill. Dec. 934, 404 N.E.2d 358, 365 (1980); *State v. Wangberg*, 272 Minn. 204, 136 N.W.2d 853, 854-55 (1965); *R. v. Finta*, [1992] 53 O.A.C. 1, 1992 Carswell Ont. 96 at ¶ 250.

More than any other portion of the opinion, these passages demonstrate the absence of authority available from this Court on the issue of religiously freighted argument. This section also points up the wisdom of AEDPA, which relieves state courts of the burden of attempting to anticipate collateral attack on the basis of out-of-jurisdiction authority. When the California Supreme Court affirmed Sandoval's death sentence, surely no member of that tribunal could have foreseen a reversal based on the opinions of the Sixth, Fourth and First Circuit Courts of Appeals, much less the Pennsylvania and Minnesota Supreme Courts, the Illinois Appellate Court, or the Ontario Court of Appeal. When AEDPA became law before Sandoval filed his first habeas petition, these thoughts would have seemed all the more remote. *See Williams v. Taylor*, 120 S. Ct. 1479, 1490 (2000) (holding that Congress enacted AEDPA to advance comity, finality and federalism).

The analysis does not end here, however. Having found the trial prosecutor's argument offended the Constitution, the Ninth Circuit considered the question of prejudice. Even in this well explored area of the law, the *Sandoval* opinion lacks the clear guidance of this Court. Had this case turned on an overwhelming show of prejudice, the court could have relied on *Brecht v. Abrahamson*, which announces the presumptive harmless error test in habeas corpus matters. *See* 507 U.S. 619, 638 (1993). This record, though, does not lend itself to such

facile analysis, and the application of AEDPA would preclude a finding of prejudice here.

In articulating its prejudice finding, the Ninth Circuit carefully focused on the effect of the error with regard to "the Marlene Wells count." Appendix L at 435. Though the court concentrated on the one count for which Sandoval had received the death penalty, it had previously noted that "The State's case against Sandoval for the Belvedere Park crimes" and "for the Wells murders was . . . strong." Appendix L at 421.

Given the uniformly "strong" evidence of guilt, there remains only one rational means to distinguish among the four brutal slayings at issue in this case: "Marlene Wells was an innocent victim and the others were all of questionable character." Appendix L at 422. The district court found as much, and the Ninth Circuit panel never questioned the characterization. The appellate court's tacit acknowledgment of Marlene Wells' unique role in this case reflects the tragic nature of her death: Sandoval "had to do her, too," simply because she had the misfortune of witnessing him dispatch her husband with three shots to the head. Appendix L at 415. Because of the characteristically cold-blooded nature of Marlene's killing, the California Supreme Court's finding of harmless error relied explicitly upon the jury's split penalty verdict, which in turn condemned Sandoval only for Marlene's murder. Appendix D.

The undisputed facts, and relative horror, of the four murders at issue in this case also provide the foundation upon which the California Supreme Court's prejudice analysis would survive under AEDPA. Marlene Wells' status as an innocent victim is precisely the type of information the States may consider in administering their criminal justice systems. As this Court has held, the Constitution cannot bar States from "offering 'a quick glimpse of the life' which a defendant chose to extinguish." *Payne v. Tennessee*, 501 U.S. 808, 822 (1991). Given its significance during trial, consideration for the victim should also inform the analysis of federal habeas courts. Yet, in this instance, the Ninth Circuit's prejudice calculus fails to

factor in the life of Marlene Wells. Appendix L. The flawed equation yields, not surprisingly, a flawed result.

The court recognized that the trial evidence "show[ed] that Marlene Wells was more innocent than the other victims." Appendix L at 422. It also found that the trial prosecutor "remind[ed] the jury on various occasions that its duty was to determine whether the evidence in aggravation substantially outweighed the mitigating evidence." Appendix L at 437. The Warden relied on these facts in arguing that the objectionable aspects of the prosecutor's argument did not affect the verdict. Appendix O. Nonetheless, the court attempted to determine prejudice with a sterile approximation of the jury's reaction to a single segment of a lengthy prosecution argument. Removed from the facts that motivated the jury's perfectly rational penalty verdict, the court necessarily found itself adrift:

> We do not know what actually happened in the jury room, but we cannot assume that the prosecutor's religious argument did not persuade at least one of the jurors to change a vote for life to death on the Marlene Wells count.

Appendix L at 435.

As a result, the court could not, and did not, conclude that the error had substantial and injurious effect. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). It, therefore, did not actually conclude the error prejudiced Sandoval. Instead, the court granted relief based on the standard this Court announced in *O'Neil v. McAninch*, 513 U.S. 432, 435 (1995): "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." Appendix L at 437 , *citing Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc).

In the end, the court's decision to vacate the death verdict amounts to a simple disagreement with the California Supreme Court. This entire analysis would have failed under AEDPA, which demands much more than mere doubt; it requires a

showing that the state court contradicted or unreasonably applied clearly established federal law as articulated by this Court. 28 U.S.C. § 2254(d); *Williams. v. Taylor*, 120 S. Ct. at 1507. Here, the Ninth Circuit made no attempt to demonstrate that the California Supreme Court failed to properly apply this Court's harmless error standards, nor could it have succeeded in doing so given the facts of Marlene Wells' life and death. *See Chapman v. California*, 386 U.S. 18 (1968). Simply stated, the finding of prejudice defies serious analysis under Supreme Court jurisprudence. Accordingly, this Court should grant certiorari and reverse the judgment of the Ninth Circuit vacating Sandoval's sentence of death in the murder of Marlene Wells.

CONCLUSION

Based on the foregoing reasoning and authority, the Warden respectfully urges this Court to grant the Petition for Writ of Certiorari.

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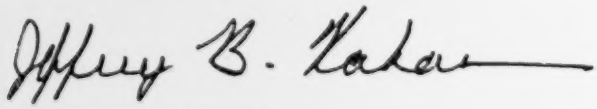

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